Supreme Court, U.S.
FILED
JUL 22 1991
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(2)

NO. 90-1639

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

UNITED STATES OF AMERICA,
PETITIONER,

V.

ROBERT WIDDOWSON, ET AL,
RESPONDENTS.

RESPONDENT ROBERT WIDDOWSON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In 1970, Congress enacted the Drug Abuse Prevention and Control Act ("the Act") 21 U.S.C. §§ 801-966. Section 811 allowed the Attorney General to outlaw or "schedule" substances permanently often making certain findings, receiving a binding recommendation from the Secretary of Health and Human Services, and complying with other procedural requirements. 21 U.S.C. §§ 811(b)(c). Section 871 of the Act provided that the Attorney General "may delegate any of his functions...to any officer or employee of the Department of Justice." 21 U.S.C. § 871. In 1973, the Attorney General subdelegated his functions under the Act to the Administrator of the Drug Enforcement Agency. 28 C.F.R. 0.100(b) (1986); 51 Fed.Reg. 15317 (21 C.F.R. Part 1308 "Summary"). In 1984, Congress added subsection (h) to § 811 of the Act, establishing summary procedures for temporary emergency scheduling of substances. Section 811(h) bypasses most of the procedures mandated for permanent scheduling. Since the subdelegation in 1973, the Administrator of the DEA has performed the functions vested by Congress in the Attorney General under the Act, including those under § 811(h).

Respondent was indicted on November 10, 1988, in the District of New Mexico, and charged in five counts involving conspiracy, possession, manufacture, and distribution of N-hydroxy 3,4 - methylenedioxy amphetamine ("NMDA"), which had been temporarily scheduled by the Administrator of the DEA under § 811(h). 52 Fed. Reg. 38225 (to be codified at 21 C.F.R. pt. 1308). On March 29, 1989, the district court filed an eight-page

memorandum opinion dismissing the indictment reasoning that the sweeping powers of § 811(h) and that Section's express grant of authority to only the Attorney General required that the Attorney General not be permitted to subdelegate § 811(h)'s powers. See Appendix B to Government's petition for writ of certiorari at 22a-24a. On October 15, 1990, the Court of Appeals for the Tenth Circuit affirmed the dismissal of the indictment, following the district court's reasoning regarding subdelegation to the DEA. See Appendix A to Government's petition for writ of certiorari at 14a-16a. In addition, the Circuit Court held invalid the original delegation of § 811(h)'s powers from Congress to the Attorney General because § 811(h) failed to provide adequate safeguards and limitations on the temporary scheduling power. See Appendix A to Government's petition for writ of certiorari at 5a-9a. The Government filed a petition for writ of certiorari to the Tenth Circuit and the Court has requested that Respondent reply to the Government's petition.

SUMMARY OF THE ARGUMENT

The delegation of emergency scheduling powers from Congress to the Attorney General is improper because § 811(h) contains no intelligible principle to which the Attorney General must conform. This issue was not contested in *Touby v. United States*, 111 S.Ct. 1752 (1991), wherein the defendant-appellants conceded the existence of an intelligible principle. Section 811(h)'s standard of allowing emergency scheduling when there is an "imminent hazard to the public safety" is unintelligible because it is too vague to constitute a meaningful restriction

or limitation on the Attorney General's power to temporarily schedule substances. The standard of § 811(h) is distinguishable from other standards held intelligible because it requires evaluation of considerably more scientific and technical factors.

The subdelegation of the emergency scheduling powers from the Attorney General to the DEA is similarly improper. Although § 871 of the Act ostensibly allows subdelegation of any of the Attorney General's functions, the radically novel emergency powers of § 811(h) were enacted 14 years later. Moreover, § 811(h) expressly authorizes its administration only by the Attorney General. Therefore, the prior statute authorizing subdelegation should not be construed to govern § 811(h).

ARGUMENT

I. THE DELEGATION OF EMERGENCY SCHEDULING POWERS FROM CONGRESS TO THE ATTORNEY GENERAL IS IMPROPER BECAUSE THERE IS NO INTELLIGIBLE PRINCIPLE TO WHICH THE ATTORNEY GENERAL MUST CONFORM.

Congress can delegate its legislative powers only if it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). That is, the delegation must be clear, definite and limited adequate standards. *Carlson v. Landon*, 342 U.S. 524 (1952). *See also Yakus v. United States*, 321 U.S. 414, 426 (1944) (delegation of price control authority held valid where legislative standards are "sufficiently definite and precise to

enable Congress, the Courts and the public to ascertain whether the administrator, in fixing the designated prices, has conformed to those standards") and *United States v. Davis*, 564 F.2d 840, 844 (9th Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978) (criminal sanctions may only be imposed for a violation of regulation promulgated by the executive branch if the delegation of authority was "accompanied by sufficient guidelines and standards for the exercise of authority.").

The adequacy of the standards provided in 21 U.S.C. § 811(h), the emergency scheduling provision of the Controlled Substances Act, has not been previously determined by this Court. The Government states on page four of its petition for writ of certiorari that the legal questions presented in this case are identical to those presented in *Touby v. United States*, 111 S.Ct. 1752 (1991). It is admittedly extremely difficult to distinguish this case from *Touby*. The issues presented are virtually identical. However, the petitioner - defendants in *Touby* chose not to challenge the adequacy § 811(h)'s standards, conceding that Congress had set forth an "intelligible principle" to constrain the Attorney General. *Touby*, 111 S.Ct. at 1756. In an attempt to distinguish *Touby*, Respondent will make no such concession.

The sole guideline provided under § 811(h) is that the Attorney General decide that scheduling "is necessary to avoid imminent hazard to the public safety." 21 U.S.C. § 811(h)(1). In reaching this decision, the Attorney General need only consider three of the eight factors normally considered before scheduling a drug as a controlled substance. Section 811(h) is without the requirements applicable to

recommendation be obtained from the Secretary of Health and Human Services, that the scheduling procedure include public notice and hearing, and that the scheduling decision be subject to judicial review. 21 U.S.C. §§ 811(a), 811(h).

The standard set forth in § 811(h) is too vague to constitute an intelligible principle that meaningfully limits or restricts the Attorney General in exercising the emergency scheduling power. The provision fails to give any guidance as to what constitutes a "hazard." This term encompasses all kinds of harms, from the slightest discomfort to death. Section 811(h) requires that the hazard be "imminent" but fails to indicate how likely a hazard must be to constitute an "imminent" hazard. The hazard must be to "the public safety," but it also remains uncertain what this phrase means. If "safety" is construed literally, as the total absence of risk, virtually any substance can be considered to be, to some degree, a hazard to the public safety. Indeed, As the Tenth Circuit noted below, under § 811(h) the Attorney General "acts with unfettered discretion when making temporary scheduling decisions, he could add a substance as innocuous as aspirin to Schedule I and his decision could not be challenged." *United States v. Widdowson*, 916 F.2d 587, 591 (10th Cir. 1990).

Although this Court was not called upon to directly address the adequacy of the § 811(h) standard in *Touby*, the Court did express an opinion in dicta. The Court looked to its prior cases in which the "intelligible principle" standard had been applied and conjectured that, "[i]n light of these precedents," the imminent hazard to the public safety standard would be adequate. Id. at 1756. However,

the cases cited by the Court, while seeming to involve standards as ambiguous as those contained in § 811(h), are distinguishable. These cases involve standards that require no special objective and technical scientific knowledge to apply and are therefore more clear and "intelligible" than the standard set out in § 811(h).

In *Lichter v. United States*, 334 U.S. 742, 778-786 (1948) the Court upheld as providing sufficient guidance statutes authorizing the War Department to recover "excessive profits" earned on military contracts. There is no scientific training required to determine what amount of profits is "excessive"; the standard can be reasonably administered by any person familiar with everyday notions of profits and costs.

Similarly, in *Yakus v. United States*, 321 U.S. 414, 426-27 (1944), the Court upheld statutes authorizing the Price Administrator to fix "fair and equitable" commodities prices. And in *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943), the Court upheld statutes authorizing the Federal Communications Commission to regulate broadcast licensing in the "public interest." The "fair and equitable" and "public interest" standards, like the "excessive" profits standard, are intelligible because the entity administering them inherently has the faculties to do so. If all the standard requires is a non-technical or non-scientific determination, it is intelligible to a much broader group of people, presumably including all reasonable persons.

In contrast, the standard in § 811(h) is whether a substance poses an "imminent hazard to the public safety." To make this determination, the Attorney General must evaluate numerous medical factors,

such as the significance of a substances abuse and the risk posed by the substance to the public health. 21 U.S.C. § 811(h)(3). These evaluations necessarily involve chemical analysis of a substance's composition and molecular structure, pharmacological study of a substance's physiological and psychological effects on a user, and research regarding the various methods by which a substance can be produced.

No similar scientific or technical factors were required to be considered in administering the "public interest,", "fair and equitable," or other ambiguous standards described above. The factors implicated in § 811(h) cannot be meaningfully evaluated without considerable scientific and technical expertise without specialized training or education many reasonable persons would have no idea about whether a substance poses an imminent hazard to public safety.

The vague principle set out in § 811(h) is less intelligible than the vague principles previously approved by the Court precisely because the factors that are required to be considered are much more difficult to understand. The abstruse nature of the § 811(h) standard thus distinguishes it from prior cases, and the Court should not feel bound to find it an "intelligible principle."

II. THE SUBDELEGATION OF EMERGENCY SCHEDULING POWERS FROM THE ATTORNEY GENERAL TO THE DRUG ENFORCEMENT AGENCY IS NOT AUTHORIZED BY CONGRESS.

It is true that 21 U.S.C. § 871(a) states as

follows:

> The Attorney General may delegate any of his functions under [the Controlled Substances Act] to any officer or employee of the Department of Justice.

21 U.S.C § 871(a). This Court cited § 871(a) in *Touby* in summarily holding that the Attorney General's subdelegation of § 811(h)'s emergency scheduling power to the Drug Enforcement Agency was not improper. *Touby*, 111 S.Ct. at 1758. However, as this Court has noted, despite a generalized grant of permission to subdelegate authority, Congress may intend to restrict the exercise of certain powers to particular persons. *United States v. Giordano*, 416 U.S. 505, 509 (1974). Because the emergency scheduling procedure was created long after § 871 was codified, and because that procedure so greatly expands the power to make law by scheduling substances, § 871 should not be construed as authorizing subdelegation of the emergency scheduling powers.

21 U.S.C. § 871(a) was enacted as part of the Controlled Substances Act in 1970. At that time, a substance could be scheduled only after a lengthy process, including the making of findings regarding eight factors:

1. Its actual or relative potential for abuse.
2. Scientific evidence of its pharmacological effect, if known.

3. The state of current scientific knowledge regarding the drug or other substance.
4. Its history and current pattern of abuse.
5. The scope, duration, and significance of abuse.
6. What, if any, risk there is to the public health.
7. Its psychic or physiological dependence liability.
8. Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

21. U.S.C. 811(c). Scheduling in 1970 also required, inter alia, a public hearing, a binding recommendation from the Secretary of Health, and judicial review of scheduling decisions. *United States v. Spain*, 825 F.2d 1426, 1428-29 (10th Cir. 1987).

The temporary scheduling powers of 21 U.S.C. § 811(h) were not enacted until 1984, as part of the Dangerous Drug Diversion Control Act of 1984, fourteen years after the passage of the subdelegation statute. Pub. L. No. 98-473, tit. II, Sec. 508, 98 Stat. 2070, 2071-72. Section 811(h) effected changes in the scheduling process that "are substantial both in substance and procedure." *Spain*, 825 F.2d at 1428. The Attorney General need no longer make findings regarding the eight factors of 21 U.S.C. § 811(c), but only "consider" factors 4, 5, and 6. No findings are required. Likewise, no

hearings need be held, no comment is required by the Secretary of Health (much less a binding opinion), and no judicial review of scheduling decisions is allowed. *Spain*, 825 F.2d at 1428-29. As the Tenth Circuit stated, "[t]he [temporary scheduling] 'procedure' if that is really what it is, is indeed summary." *Spain*, 825 F.2d at 1428.

Because so many safeguards were removed from the temporary scheduling process, because fourteen years elapsed between passage of the statute authorizing subdelegation and the enactment of § 811(h), and because § 811(h) expressly grants powers only to the Attorney General, § 871(a) should not be construed to authorize subdelegation of any powers granted in § 811(h). This conclusion merits special consideration in light of the fact that, if § 871(a) is held to govern § 811(h), plenary power to create a felony could be vested in "any...employee of the Department of Justice." 21 U.S.C. § 871(a).

This Court faced a similar situation *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942), in construing a provision of the Fair Labor Standards Act ostensibly allowing that the Administrator of the Wage and Hour Division "or his duly authorized representative may exercise any or all of his powers in any place." 29 U.S.C. § 204(c). The Court held that Congress did not intend to permit subdelegation of the Administrator's authority to sign and issue subpoenas duces tecum. The Court stated:

> A construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative

> judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words.

Cudahy, 315 U.S. at 361.

The emergency scheduling provision of § 811(h), with its "imminent hazard to the public safety language," requires at least as much discretion as the subpoena provision in *Cudahy*. As was the case in *Cudahy*, the statute creating the delegated power in this case speaks only of the party attempting to delegate the power; § 811(h) states only that the Attorney General may exercise temporary scheduling powers. No mention is made of the DEA or any other potential delegatee. Therefore, only the Attorney General should be allowed to wield this potent emergency power.

CONCLUSION

The petition for writ of certiorari should be granted in order to allow the Respondent to attempt to distinguish *Touby v. United States*, 111 S.Ct. 1752 (1991). If the Court feels that this case is indistinguishable from *Touby*, the petition should be granted and this case remanded to the Tenth Circuit with appropriate instructions.

Respectfully submitted,

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